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**IN THE
COURT OF APPEALS OF INDIANA**

NATHAN R. SANDERS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-0703-CR-277

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Les A. Meade, Judge
Cause No. 79D05-0604-FD-168

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Nathan R. Sanders appeals his conviction and sentence for Escape, as a Class D felony.¹ We affirm.

Issues

Sanders raises four issues on appeal, which we re-state as follows:

- (1) Whether there was sufficient evidence to find that Sanders committed Escape by intentionally removing his electronic monitoring device;
- (2) Whether the trial court committed fundamental error in instructing the jury on the elements of the crime;
- (3) Whether the rule of lenity required Sanders to be convicted of Unauthorized Absence from Home Detention, as a Class A misdemeanor, rather than Escape, as a Class D felony; and
- (4) Whether the trial court abused its discretion in sentencing Sanders.

Facts and Procedural History

Sanders entered a home detention program for conduct unrelated to the instant offense. Participation in the program allowed him to reside at his home and to travel to work and counseling. As conditions of entering the program, Sanders agreed to refrain from using illegal drugs and to wear a monitoring device secured around his leg. The device consisted of two pieces of equipment—an ankle bracelet (“bracelet”) and a separate home monitoring unit (“home unit”) connected to a landline telephone and a source of electricity. By design, the bracelet would notify the home unit that the defendant had left or entered a certain radius of the home unit. The home unit then would send an electronic alert of that event to the Tippecanoe County Community Corrections office. Similarly, severing the bracelet or

cutting electricity to the home unit would prompt the home unit to send alerts of those events to the same office.

While in the program, Sanders allegedly submitted a urine sample that tested positively for cocaine. Kurt Sinks, Work Release Coordinator for Tippecanoe County Community Corrections, sought and received a warrant for Sanders' arrest. Pursuant to the warrant, Sinks and officers of the Lafayette Police Department entered Sanders' residence, finding a severed bracelet and a home unit unplugged from its source of electricity. Sanders, however, was not present.

The State charged Sanders with Escape, alleging that he "did knowingly or intentionally violate a home detention order or intentionally removed an electronic monitoring device." Appendix at 5. A jury found him guilty.

In sentencing Sanders, the trial court found a mitigating circumstance in "the continuing support of his family." Id. at 59. Meanwhile, the trial court found five aggravating circumstances: his risk to re-offend, his criminal record, his history of substance abuse, the fact that he was on probation at the time of the instant offense, and the nature and circumstance of the crime. The trial court sentenced Sanders to the maximum three-year term of imprisonment for a Class D felony, suspending one year of the term to be served on probation. Sanders now appeals.

¹ Ind. Code § 35-44-3-5.

Discussion and Decision

I. Sufficiency of the Evidence

Our standard of review when considering the sufficiency of the evidence is well settled. We will not reweigh the evidence or assess the credibility of witnesses. Robinson v. State, 699 N.E.2d 1146, 1148 (Ind. 1998). Rather, we consider only the evidence that supports the verdict and draw all reasonable inferences from that evidence. Id. We will uphold a conviction if there is substantial evidence of probative value from which a jury could have found the defendant guilty beyond a reasonable doubt. Id.

Sinks testified that he found a severed bracelet and an unplugged home unit in Sanders' residence. A computer printout of the Tippecanoe County Community Corrections office confirms that Sanders' home unit was disconnected from its source of electricity on the same day. Sanders himself testified as follows on cross-examination:

Q: . . . [W]hat was the reason you cut off your ankle bracelet?

A: I wanted to resolve the warrant, the outstanding warrant and re-establish the time that I was serving on home detention.

Q: If you wanted to re-establish or correct the situation, couldn't you have turned yourself in with the ankle bracelet on?

A: Like I said I was unaware of the proper procedure. I didn't want to be charged with theft, so I left the [bracelet and the home unit] at my home together.

App. at 220-21. There was sufficient evidence to find that Sanders intentionally removed his electronic monitoring device.

II. Jury Instructions

On appeal, Sanders argues that the trial court committed fundamental error in instructing the jury, acknowledging that he failed to object to the instructions at trial. “[W]hen this Court considers a claim of fundamental error, we look to the jury instructions as a whole to determine if they were adequate.” Ringham v. State, 768 N.E.2d 893, 898 (Ind. 2002).

Specifically, Sanders asserts that the trial court confused the jury by giving preliminary and final instructions that varied slightly in setting forth the elements of the crime. The trial court’s preliminary instruction appeared as follows:

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant, Nathan R. Sanders
2. knowingly or intentionally
3. violated a home detention order or
4. intentionally removed an electronic monitoring device.

If the State failed to prove each² of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Escape, a Class D felony.

App. at 13. The final instruction, however, listed only three elements, combining the third and fourth elements of the preliminary instruction.

1. The Defendant, Nathan R. Sanders
2. knowingly or intentionally
3. violated a home detention order or intentionally removed an electronic monitoring device.

Id. at 19, 20. The final instruction contained the same sentences immediately above and immediately below the numbered elements, adding the following explanation for the

variance.

There is an inconsistency between the language of Instruction 5.37B that was given to you in the preliminary instructions and in the final instructions. You are instructed that the language of Instruction 5.37B contained in the final instructions is correct and that it is the language which you should follow.

Id. at 20. Also, both sets of instructions directed, pursuant to the presumption of innocence, that the State had to prove each element beyond a reasonable doubt.

The trial court addressed the variance in how it set forth the elements of the crime and gave clear direction that the jury should use the language in the final instruction. Furthermore, both instructions also quoted accurately the statute. Looking at the instructions as a whole, the trial court gave adequate instruction to the jury.

III. Rule of Lenity

Sanders asks that we reduce his conviction from Escape, as a Class D felony, to Unauthorized Absence from Home Detention, as a Class A misdemeanor.³ He argues that, pursuant to the rule of lenity, his conduct is proscribed by two statutes of different sanction and therefore, the more lenient penalty should be imposed. Further, he argues that the Unauthorized Absence statute applies more specifically to his conduct than does the Escape statute.

Criminal statutes must be strictly construed against the State. Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005). Where there is ambiguity, it must be resolved against the penalty. State v. Downey, 770 N.E.2d 794, 797 (Ind. 2002). Here, however, Sanders fails to

² Rather than “each,” the trial court should have used the word “any” in this sentence.

³ Ind. Code § 35-38-2.5-13.

suggest an ambiguity in either statute, arguing only that he “could have been prosecuted under either.” Appellant’s Brief at 24. Meanwhile, contrary to his assertion, the Escape statute addresses more specifically Sanders’ conduct. The crime of Escape prohibits intentionally removing an electronic monitoring device, while the crime of Unauthorized Absence constrains only where the detainee may travel. The latter does not address the severing of a monitoring bracelet, the focus of the State’s case. The rule of lenity does not apply here.

IV. Sentencing

The General Assembly enacted a series of amendments to Indiana’s sentencing statutes, including the following provision, effective April 25, 2005.

A court may impose any sentence that is:

- (1) authorized by statute; and
- (2) permissible under the Constitution of the State of Indiana;

regardless of the presence or absence of aggravating circumstances or mitigating circumstances.

Ind. Code § 35-38-1-7.1(d) (emphasis added). However, the legislature retained the requirement for felony sentencing that a trial court make a statement of its reasoning “[i]f the court finds aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-3.

“So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). “An abuse of discretion occurs if the decision is ‘clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be

drawn therefrom.” Id. (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). When imposing sentence for a felony, the trial court must enter “a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence.” Id. at 491. Its reasons must be supported by the record and must not be improper as a matter of law. Id.

Sanders argues, even for crimes committed after the General Assembly’s enactment of advisory sentencing, that Blakely v. Washington requires the jury to find aggravating circumstances. Blakely v. Washington, 542 U.S. 296 (2004). Our Supreme Court has directed otherwise. Anglemyer, 868 N.E.2d at 489; Davidson v. State, 849 N.E.2d 591, 595 (Ind. 2006). “[F]or Blakely purposes the maximum sentence is now the upper statutory limit.” Anglemyer, 868 N.E.2d at 489.

Finally, Sanders argues that one of the five aggravating circumstances found by the trial court was improper. We agree. The reasoning of a sentencing statement must not be improper as a matter of law. Id. at 491. The nature and circumstance of a crime can be a proper aggravator. Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002). However, a trial court may not use a material element of an offense as an aggravating circumstance. Id. To find an aggravating circumstance in the particular manner in which a crime is committed, the trial court must “specify why a defendant deserves an enhanced sentence under the particular circumstances.” Id. (concluding that “the trial court’s description of the aggravating circumstances fail[ed] to specify any particular manner or circumstances related to the commission of the crimes beyond the material elements of the crimes for which the defendant

was convicted”).

In addressing aggravating circumstances at Sanders’ sentencing, the trial court stated that the “crime was committed when he cut the bracelet off. That wasn’t accidental. It wasn’t – it was a decision to do that.” App. at 287. Intentionally cutting the bracelet was a material element of the crime. Accordingly, this finding was improper.

Nonetheless, we note that the trial court found four other aggravating circumstances in sentencing Sanders: his risk to re-offend, his criminal record, his history of substance abuse, and the fact that he was on probation at the time of the instant offense. The trial court emphasized its concern for Sanders’ history of illegal conduct, which consisted of eight misdemeanor convictions and two felony convictions. Furthermore, the trial court noted that Sanders’ completion of three phases of substance abuse treatment had not been effective in assisting him to conform his conduct. In light of this record, we can say with confidence that the trial court would have imposed the same sentence even without finding an improper aggravating circumstance. See Anglemeyer, 868 N.E.2d at 491. The trial court did not abuse its discretion in sentencing Sanders.

Conclusion

There was sufficient evidence to convict Sanders of Escape. The trial court did not commit fundamental error in instructing the jury. The rule of lenity was not applicable in this case. Finally, the trial court did not abuse its discretion in sentencing Sanders.

Affirmed.

SHARPNACK, J., and MAY, J., concur.